89-1099

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

State of Arizona, Petitioner v. City Court of the City of Tucson, the Honorable Carmen Dolny, a Magistrate thereof; Superior Court of the State of Arizona, County of Pima, the Honorable John Hawkins, a Judge thereof, Arizona Supreme Court, Respondents, and Timothy Haring, Real Party in Interest,

and

State of Arizona, Petitioner v. City Court of the City of Tucson, the Honorable Margarita Bernal, a Magistrate thereof; Superior Court of the State of Arizona, County of Pima, the Honorable Thomas Meehan, a Judge thereof, Arizona Supreme Court, Respondents, and Marvin Littles, Real Party in Interest.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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.1.(a) The questions presented for review are:

(1) Whether a defendant criminally charged with unlawful possession of marijuana, a class 1 misdemeanor, is constitutionally entitled to a jury trial;

(2) Whether the state court decision is in conflict with the decisions of the Supreme Court of the United States;

(3) Whether the State Court has exceeded its jurisdiction and supplanted its judgment for that of the legislature in a legislative arena.

(4) Whether Arizona's "reformulation" of the Federal right to jury trial test violates the Equal Protection Clause of the United States Constitution.

.1.(b) The caption of the case contains the names of all parties.

.1.(c) Table of Contents and Table of Authorities:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

State of Arizona, Petitioner v. City Court of the City of Tucson, the Honorable Carmen Dolny, a Magistrate thereof; Superior Court of the State of Arizona, County of Pima, the Honorable John Hawkins, a Judge thereof, Arizona Supreme Court, Respondents, and Timothy Haring, Real Party in Interest,

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ON APPEAL FROM THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

COMES NOW the State of Arizona, by and through the undersigned Tucson City Attorney, and petitions the Court for a writ of certiorari to review the decision

of the Supreme Court of the State of Arizona.

.1.(d) The opinions delivered in the courts below are:

(1) State of Arizona v. Tucson City Court and Marvin Littles, Real Party in Interest, No. 245298 (Ariz., filed Nov. 2, 1987) and State of Arizona v. Tucson City Court and Timothy Haring, Real Party in Interest, No. 245299 (Ariz., filed Nov. 2, 1987).

(2) State of Arizona, Petitioner/Appellant v. City Court of the City of Tucson, the Honorable Carmen Dolny, a Magistrate thereof; the Superior Court of the State of Arizona, County of Pima, the Honorable John Hawkins, a Judge thereof, and Timothy Haring, Real Party in Interest/Appellee.

(3) State of Arizona, Petitioner/Appellant v. City Court of the City of Tucson, the Honorable Margarita Bernal, a Magistrate thereof; the Superior Court of the State of Arizona, County of Pima, the Honorable Thomas Meehan, a Judge thereof, and Marvin Littles, Real Party in Interest/Appellee.

NOS. 2 CA-CV 87-0351

2 CA-CV 87-0353 (Filed April 19, 1988)

(4) State of Arizona ex rel. Frederick S. Dean v. the Honorable Carmen Dolny, a Magistrate of the City Court of the City of Tucson; the Superior Court of the County of Pima; the Honorable John Hawkins, a Judge thereof and Timothy Haring;

State of Arizona ex rel. Frederick S. Dean v. the Honorable

Margarita Bernal, a Magistrate for the City Court of the City of Tucson; the Superior Court of the State of Arizona, County of Pima, the Honorable Thomas Meehan, a Judge thereof and Marvin Littles.

36 Ariz. Adv. Rep. 35 (filed June 15, 1989) (motion for reconsideration denied September 26, 1989)

.1.(e) Jurisdiction of this Court is invoked on the following grounds:

(1) Review is sought of the June 15, 1989 decision of the Supreme Court of the State of Arizona.

(2) Motion for Reconsideration was denied September 19, 1989 and mandate issued September 27, 1989. No extension of time for petition for certiorari is sought.

(3) Petitioner is unaware of any cross-petitions for a writ of certiorari.

(4) This Court has jurisdiction to review the decision in question by writ of certiorari pursuant to 28 U.S.C., Rule 17, Supreme Court Rules.

.1.(f) This case involves the following constitutional provisions:

(1) U.S. Const., Amend. VI:

> **AMENDMENT [VI.]**
>
> **Jury trial for crimes, and procedural rights**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> **Proposal and Ratification**
> See note under Amendment [1].

(2) Ariz. Const., Art. 2, Sections 23 and 24 (amended 1972):

§ 23. Trial by jury; number of jurors specified by law

Section 23. The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Amendment approved election Nov. 7, 1972, eff. Dec. 1., 1972

§ 24. Rights of accused in criminal prosecutions

Section 24. In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses

> in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

.1.(g) The facts material to consideration of the questions involved:

Both cases involved essentially the same facts and were consolidated in the Arizona Court of Appeals. Each defendant was arrested on outstanding warrants, and small amounts of marijuana were found on both in searches incident to arrest. Each defendant was charged with unlawful possession of less than one pound of marijuana not for sale. The offenses are class 6 felonies, however, pursuant to written policies of the Pima County Attorney, both were automatically filed as Class 1 misdemeanors, punishable by up to

six months in jail and a $1,000.00 fine, plus applicable surcharges. The defendants were arraigned before different City magistrates, and each case was set for a jury trial. The City objected to the jury settings and subsequently petitioned the Pima County Superior Court for special action relief in both cases; the court denied relief. The City then appealed to the Arizona Court of Appeals, Division Two. The Court of Appeals consolidated the cases and held that the defendants were not entitled to a jury trial under either the United States Constitution, federal decisional law, the Arizona Constitution or Arizona state decisional law. Defendants subsequently sought review in the Arizona Supreme Court. The Arizona Supreme Court vacated the Court of Appeals decision, "reformulating" prior Arizona case law

interpreting the United States and Arizona Constitutions; and holding that a misdemeanor charge of possession of marijuana is sufficiently serious to warrant a jury trial.

.1.(h) The issue sought to be reviewed was first raised at the trial court level in both cases and petitions for special action (interlocutory appeal) were filed on September 10, 1987. Appeals on both cases followed denial of special action relief, timely re-raising federal and state constitutional issues. Upon appeal by defendants, the federal and state constitutional issues were relied upon by the State in opposition. See Appendices (k) (i) - (iii), inclusive.

.1.(i) Review of a federal court action is not sought.

.1.(j) The question presented for review concerns the noted federal and state constitutional provisions. In addition, the state court decision, both in its result and its reasoning, is in direct conflict with decisions of this Court, and espouses a completely subjective determination in the courts in an area properly the province of the legislature. Moreover, the Arizona Supreme Court has demonstrated the unworkable subjectivity of the espoused standard in its own decisions rendered subsequent to its decision for which review is herein requested.

The doctrine that there is no right to a jury trial in "petty offenses" is deeply entrenched in the law (Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888)) cited in Rothweiler v. Superior Court of Pima County, 100 Ariz. 37, 410

P.2d 479 (1966) (Rothweiler No. 2); see also Duncan v. Louisiana, 391 U.S. 145, 159 (1968); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937). The process for determination of whether a crime is a petty offense that constitutionally may be tried without a jury is also deeply entrenched in the law. Both concepts originate in the federal law through the Sixth Amendment to the United States Constitution. See Rothweiler v. Superior Court of Pima County, 1 Ariz.App. 334, 402 P.2d 1010 at 1012 (1965) (Rothweiler No. 1); Rothweiler No. 2, page 42. The State of Arizona recognizes this origination and its application in Arizona. Rothweiler, id.; U.S.C.A. Constitution Article 3, Section 2; Amendment 6, 14; A.R.S. Constitution Article 2, Sections 23 and 24.

In order to determine whether the offense of DUI was serious or petty, the Rothweiler court used the United States Supreme Court's three-prong test of ". . . the severity of the penalty inflictable, as well as the moral quality of the act and its relation to common law crimes . . .". Rothweiler at page 42. (All references to Rothweiler hereinafter are to Rothweiler No. 2 unless specifically denoted otherwise). The Arizona Supreme Court adopted this standard citing with approval: Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1988); See also, District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937); District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930); Schick v. U.S., 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904). It is apparent that when

Justice Udall wrote this opinion for the Arizona Supreme Court, he adopted outright the United States Supreme Court's criteria for deciding whether an offense was petty or serious enough to warrant a jury trial. It is worthy of note that he did so two years before Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d. 491 (1968) made the Sixth Amendment's right to jury trial guaranteed to defendants by the United States Constitution applicable to the states by the due process clause of the Fourteenth Amendment.

The Arizona Supreme Court, in the cases at bar, recognizes the precedence of the Sixth Amendment concepts and federal decisional law, as well as the requisite developed Arizona decisional law. The crux of the decision at issue is the application of the first prong of the now familiar

Rothweiler test articulated by the Arizona Supreme Court in Rothweiler No. 2. As noted previously, the Rothweiler three-prong determination is itself the result of the examination of the United States Constitution and the Arizona Constitution, and the conclusion that the guarantee of a jury trial in the Arizona State Constitution is substantially the same as that of the Sixth Amendment to the Federal Constitution. Rothweiler No. 1; A.R.S. Constitution Article 2, Sections 23 and 24; U.S.C.A. Constitution Amendment 6. The Arizona Supreme Court has consistently held that the right to jury trial in Arizona is no greater than it was before the State Constitution was enacted. Brown v. Greer, 16 Ariz. 215, 141 P. 841 (1914); State v. Armstrong, 103 Ariz. 174, 438 P.2d 411 (1968). Even the State of Washington, from

which most of Arizona's Constitution, and particularly the wording of Article 24, was copied, has held that their State Constitution guarantees those rights to trial by jury which existed at the time of the adoption of the constitution. Firchau v. Gaskill, 88 Wsh.2d 109, 558 P.2d 194 at 197 (1977); S.P.C.S., Inc. v. Lockheed Shipbuilding, 29 Wash.App. 930, 631 P.2d 999 (1981).

What the Arizona Supreme Court next reasons is a misstatement of federal and state decisional law, as well as the usurpation of the legislative power and prerogative. The Arizona court concludes, at page 37 of its opinion reported at 36 Ariz. Adv. Rep. 35, that a conviction for possession of marijuana results in consequences sufficiently grave to warrant a jury trial. Those consequences, the

court goes on, are illustrated by decreased employment opportunities, possible imposition of conditions on employment, such as drug counseling, treatment or testing, and the possible unavailability of certain occupations and professional licenses. These consequences, the court reasons, "bring the crimes out of the category of petty cases and into the category of serious cases, . . . Thus, defendants are entitled to a jury trial." The consequences, as enumerated and counseled for consideration by the Arizona court, are non-statutory, collateral consequences of conviction and are not appropriate for examination pursuant to the Rothweiler tests. In addition, consideration of said collateral consequences is a misapplication of federal decisional law. As Arizona Supreme Court

Justice Corcoran correctly points out in his dissent, only penalties directly resulting from state action, that is, those mandated by specific statute or regulation and resulting from state action should be considered. See Blanton v. City of North Las Vegas, _____ U.S. _____, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), note 8. As Mr. Justice Marshall of the United States Supreme Court correctly points out in Blanton, the non-statutory consequences of a conviction "are speculative in nature because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values." Blanton, note 8. While the Arizona court postulates that the instant consideration falls within the Rothweiler case, the court then proceeds to "slightly reformulate" the

test by introducing to the consideration subjective judicial sympathy and emotions quite apart from the objective standards necessary for formulation of any workable benchmark for this or any other consideration.

Petitioner respectfully points out that in each consideration of the Rothweiler test, or those discussions preceding the articulation of the Rothweiler test, all considerations were of direct consequences of the state action and state imposed punishment, not of collateral and adjunct "social consequences." Even in Rothweiler proper, when the Arizona court discussed the use of an automobile and the possible loss of the use of said automobile as an examination of the severity of the penalty, it was examining a penalty meted out by the state; that is, the statute provided for

the possibility of the loss of the driving privilege upon conviction. The Arizona court's cited case of State v. Pima County Superior Court, 121 Ariz. 174, 589 P.2d 48 (App. 1978) stands not for the proposition that an accused's ability to earn a living is a proper yardstick for measuring "severity of penalty," but, according to Arizona Appeals Court Chief Judge Richmond, is an onus of moral turpitude that attaches to a conviction for shoplifting. It is therefore not a consideration in assessing the statutory severity of penalty. As Justice Corcoran further notes in dissent, this "moral quality" of an offense is considered in the second and separate prong of Rothweiler, and not in consideration of the "severity of penalty."

As correctly noted in Blanton and approved by the Arizona Supreme Court, the

most relevant criteria for determining the seriousness of an offense is the severity of the maximum authorized penalty fixed by the legislature. "In fixing the maximum penalty for a crime, a legislature include[s] within the definition of the crime itself a judgment about the seriousness of the offense." Blanton citing Frank v. United States, 395 U.S. 147 (1969). That judgment of the legislature is the most relevant criteria in determining the seriousness with which society regards an offense. See Frank and Blanton.

To expand the Rothweiler inquiry past statutory consequences of conviction is an infringement on the legislative power and prerogative to declare and define what crimes are serious. The Arizona legislature has made available to those

convicted of certain offenses, including misdemeanor marijuana possession, the opportunity to apply for the setting aside of the judgment of guilt pursuant to A.R.S. § 13-907. In so doing, the legislature has addressed the collateral consequences of which this Court speaks, insofar as the legislature has deemed appropriate. For the judiciary to supplant its judgment as to the seriousness of crime is usurpation of power reserved to the legislature.

The United States Supreme Court, in The District of Columbia v. Clawans, 310 U.S. 617, 57 S.Ct. 660 (1937), again referring to federal decisional law on Sixth Amendment questions of jury trial and the parameters under which that right is tested, recognized the statutorily allowed sentence as most relevant in determining severity of punishment. This, of course,

leads inexorably to the first prong of a Rothweiler test about which the Arizona court is concerned. The fact is that Rothweiler counsels consideration only of statutorily mandated possible sentences. How could it be otherwise? That is a pure statement of the legislative will and purpose. The judiciary should not substitute its judgment as to the seriousness of a crime for that of a legislature. The legislature is far better equipped to perform the task, and likewise, more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect. Blanton, citing Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. Cal. 1988 en banc cert. pending No. 88-5043).

Referring again to Rothweiler No. 1 at page 341, the Arizona court therein searches for the legislative intent and approves of the statement that in the matters of jury trial, considerable margin for legislative discretion should be afforded. Quoting 39 Harvard Law Review page 979; District of Columbia v. Clawans. Variances in standards of action and of policy from generation to generation recognized by the Supreme Court in Clawans must find final expression in the legislative pronouncements of the various legislatures and not in judicial fiat.

The Arizona court leaves no standard with which to prospectively judge its opinion. The consequences which the court recognizes cannot, over time, be determined with any degree of confidence. Petitioner admits of confusion as to how the "slightly

reformulated" test might, in practice, be utilized. On the one hand, an individual may subject himself to loss of his/her driving privilege by accumulating a sufficient number of civil traffic violations. Presumably, this loss of driving privilege would have the same possible collateral non-statutory consequences on this individual as would the loss of the driving privilege through a DUI conviction. Those collateral consequences (decreased employment opportunities, possible imposition of conditions on employment, etc.) being equated to "grave consequences resulting from convictions" pursuant to the "reformulated" test announced by the Arizona Supreme Court, mandate a jury trial for said individuals. This would further exacerbate the problems of an already

overcrowded and overburdened court system. The potential for additional jury trials is multi-fold and not easily estimated, but is certainly unmanageable with today's limited judicial resources. On the other hand, if the above situation is not that envisioned by the Arizona Supreme Court, is each case to be evaluated individually for its possible non-statutory collateral consequences to the individual defendant, in violation of the Equal Protection Clause of the United States Constitution? Certainly, the defendant who is entering law school could demonstrate the possible grave non-statutory collateral consequences mentioned by the Arizona Supreme Court. A retired 70-year old farm worker, however, does not have the benefit of such consideration. Indeed, future employment may be of no consequence to him. Both

individuals, however, are entitled to the same application and protection of the law. Any application of the court's reformulated test must result in one course or the other, and neither result is tenable in our system of law.

The Arizona Supreme Court itself demonstrates the speculative nature of the propounded consideration in its subsequent decision in In Re Marquardt, 59 Ariz. Adv. Rep. 27, filed July 25, 1989. That case dealt with proceedings in judicial misconduct and involved the conviction of an Arizona Superior Court judge of the Texas misdemeanor of possession of marijuana. In that opinion, the Arizona Supreme Court, in discussing the seriousness of the crime, stated:

> Thus, we agree with the Commission's view: the maximum punishment imposable under Arizona law for the conduct involved, and not

> speculation as to how the case otherwise might have been handled, determines whether the crime charged was one 'punishable as a felony' within the meaning of Art. 6.1, § 3.
> (emphasis added)

Marquardt, page 29.

The Arizona Supreme Court further states at page 30:

> The very fact that the legislature classified this crime as either a felony or a misdemeanor indicates the crime is not of the highest order.
> (emphasis added)
>
> * * * *
>
> Mere possession of small amounts of marijuana for personal use has always been considered a crime malum prohibitum - wrong because prohibited by legislation. In Re Chase, 299 Or. 391, _____, 702 P.2d 1082, 1086 (1985)
> (emphasis added)

The Arizona court continues in Marquardt to support its contention that misdemeanor

marijuana possession is not a "serious" offense.

While the ultimate issue for determination is not identical in Marquardt and Haring/Littles, the categorization of the underlying criminal conduct as "serious" is the same. What the two cases demonstrate, taken together, is that consideration of non-statutory and collateral consequences of criminal convictions is so speculative and subjective that the result rests not on the legislative determination, but on subjective sympathy and emotion, which, apparently, depends on the predisposition of the judiciary in each individual setting.

What the Arizona Supreme Court has demonstrated is what the Blanton court recognized; that "nonstatutory consequences

of a conviction 'are speculative in nature, because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values'." Blanton at footnote 8.

What the court's newly announced shifting value consideration has done is to remove the matter from the consideration of the only entity that is equipped to respond to those shifting considerations; that is, the legislature. "Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." Columbia v. Clawans, infra.

It is doubtful that the Arizona Supreme Court, faced with a legislative enactment

or delegation of authority to a lesser administrative body, would approve of such enactment or delegation being prefaced with consideration of such a shifting value standard as that announced in the case at bar. Such standard is unworkable and unpredictable for lack of non-discretionary and objective standards with which to gauge the right.

CONCLUSION

The Petitioner respectfully adopts Arizona Supreme Court Justice Corcoran's dissent and reiterates that the Blanton court reasoning and determination is controlling in the cases at bar. A jury trial for misdemeanor marijuana possession, pursuant to the true Rothweiler test, is not required by either the United States Constitution, the Arizona Constitution, or Arizona statutes. No good cause has been

demonstrated for the courts to substitute their judgment for that of the legislature in determining the seriousness of a purely statutory crime. In performing an analysis of the right to jury trial, only penalties resulting from state action, e.g., those mandated by statute or regulation can be considered.

A defendant is entitled to a jury trial for a charge of misdemeanor marijuana possession "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the authorized period of incarceration, are so severe that they clearly reflect a legislative determination

that the offense in question is a 'serious' one." Blanton, infra. (emphasis added).

The decision at issue and presented to this Court does not rest on independent state grounds. Indeed, the right to jury trial in Arizona is an admitted application of the Sixth Amendment to the United States Constitution. Petitioner therefore suggests that this Court has very recently decided this precise issue in Blanton. The Court need not now grant plenary review and revisit those considerations. Petitioner respectfully requests that this Court summarily reverse the holding of the Arizona Supreme Court, as it is in direct conflict with this Court's decision in

Blanton v. City of North Las Vegas, infra.

RESPECTFULLY SUBMITTED this 17th day of November, 1989.

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.1.(k) Appendix -

(i) Arizona Supreme Court Opinion - 6-15-89

(ii) Arizona Court of Appeals, Division Two - Opinion filed 4-19-88

Pima County Superior Court Judgment 11-2-87 re:Littles, Minute Entry 10-13-87 and amendment 10-26-87

(with City Court minute entry 10-26-87)

Pima County Superior Court Judgment 11-2-87 re:Haring, Minute Order 10-14-87

(iii) 9/26/89 Minute Order re denial of Motion for Reconsideration Arizona Supreme Court Mandate

A P P E N D I X (i)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

STATE OF ARIZONA ex rel. Frederick S. Dean, Petitioner/ Appellant, v. The HONORABLE CARMEN DOLNY, a Magistrate of THE CITY COURT OF THE CITY OF TUCSON; THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA; the HONORABLE JOHN HAWKINS, a Judge thereof; Respondents, and TIMOTHY HARING, Real Party in Interest/Appellee.	(Filed June 15, 1989) Supreme Court No. CV-88-0272-PR Court of Appeals Nos. 2 CA-CV 87-0351 and 2 CA-CV 87-0353 (consolidated) Pima County Nos. 245298 and 245299
STATE OF ARIZONA ex rel Frederick S. Dean, Petitioner/ Appellant, v. The HONORABLE	O P I N I O N

MARGARITA BERNAL, a Magistrate for THE CITY COURT OF THE CITY OF TUCSON; THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, the HONORABLE THOMAS MEEHAN, a Judge thereof;

Respondents,

and

MARVIN LITTLES,

Real Party in Interest/Appellee.

Appeal from the Superior Court of Pima County

The Honorable Thomas Meehan, Judge
The Honorable John Hawkins, Judge

AFFIRMED

- -

Opinion of the Court of Appeals, Division Two, _____ Ariz. _____, _____ P.2d _____ (App.),

VACATED

Frederick S. Dean, Tucson City Attorney
By M.J. Raciti, L. Michael Anderson and Christopher L. Straub, Assistant City Attorneys, Tucson

Attorneys for Petitioner/Appellant

Dunscomb & Shepherd
By Denice R. Shepherd, Tucson
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MOELLER, Justice

JURISDICTION

These two consolidated cases are both misdemeanor prosecutions for possession of marijuana. The court of appeals, in a published opinion, reversed lower court orders granting jury trials in these cases. We granted review and have jurisdiction pursuant to article 6 § 5(3) of the Arizona Constitution and Rule 23 of the Arizona Rules of Civil Appellate Procedure.

ISSUE

Whether a defendant criminally charged with unlawful possession of marijuana, designated as a Class 1 misdemeanor, is

entitled to a jury trial.

BACKGROUND

The court of appeals consolidated the cases of Timothy Haring and Marvin Littles. Both cases involve essentially the same set of facts. Each defendant was arrested on outstanding warrants: Haring on August 19, 1987, and Littles on August 29, 1987. In each case, a search incident to arrest revealed a small amount of marijuana. Each defendant was charged with unlawful possession of less than one pound of marijuana not for sale. A.R.S. § 13-3405(B)(1) makes such offenses Class 6 felonies. However, pursuant to written policies of the Pima County Attorney, felony prosecution was automatically declined and the cases were filed as Class 1 misdemeanors, punishable by up to six months in jail and a $1,000 fine, plus

applicable surcharges. The defendants were arraigned before different city magistrates, and each case was set for a jury trial. The city objected to the jury settings, arguing that under the decisions in State v. Moreno, 134 Ariz. 199, 655 P.2d 23 (App. 1982), and State ex rel. Dean v. City Court of Tucson, 141 Ariz. 361, 687 P.2d 369 (App. 1984), the defendants were not entitled to a jury trial.

The city petitioned the Pima County Superior Court for special action relief in both cases; the court denied relief. The city then appealed to Division Two of the court of appeals. The court of appeals held that the defendants were not entitled to a jury trial.

COURT OF APPEALS DECISION

The court of appeals first concluded that federal constitutional law did not

require a jury trial in these cases. Recent federal case law supports the court's opinion, at least where the constitutional analysis is limited primarily to a consideration of the severity of the potential punishment. See Blanton v. City of North Las Vegas, Nev., _____ U.S. _____, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989). The court of appeals then looked to the rules developed in Arizona for determining the circumstances under which state law requires a jury trial. The appeals court correctly noted that we have applied a three-pronged test to answer this question. Rothweiler v. Superior Court, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966).

The three prongs of the Rothweiler test are: (1) the severity of the possible penalty; (2) the moral quality of the

crime; and (3) the relationship of the crime to common law crimes. The court of appeals concluded that the defendants did not qualify for a jury trial under Rothweiler.

The court reasoned that because the possible penalty for a Class 1 misdemeanor is "only" a $1,000 fine and six months in jail, the penalty was not severe enough to necessitate a jury trial. State v. City Court of Tucson, 157 Ariz. 599, 602, 760 P.2d 599, 602 (1988) (citing State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1078 (1980)). The court also determined that because no common law counterpart to possession of marijuana existed, that aspect of Rothweiler was unavailable. The court concluded finally that possessing marijuana does not involve moral turpitude; thus the "moral quality"

prong of Rothweiler also did not apply.

DISCUSSION

The right to a trial by jury is guaranteed in article 2, §§ 23 and 24 of the Arizona Constitution.[1] It has been held that jury trial is not available to all criminal defendants, but rather only to those defendants charged with serious, as opposed to petty, crimes. See, e.g., Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975); Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479 (1966); See also Baldwin v. New York, 399 U.S. 66, 90 S.Ct.

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[1]Article 2, § 23 of the Arizona Constitution provides in pertinent part:

> The right of trial by jury shall remain inviolate.

Article 2, § 24 provides in part:

> In criminal prosecutions, the accused shall have the right to . . . have a speedy public trial by an impartial jury . . .

1886, 26 L.Ed.2d 437 (1970) (establishing standard for "petty" under the federal constitution).

Our legislature has defined "petty offense" as "an offense for which a sentence of a fine only is authorized by law." A.R.S. § 13-105(24). We agree with the observations of Judge Contreras dissenting in State v. Moreno, 134 Ariz. 199, 655 P.2d 23 (App. 1982), that, while the statutory definition of "petty" is not controlling on the issue of right to jury trial, it is entitled to considerable deference, particularly given the fact that our legislature has defined the terms "felony," "misdemeanor," and "petty" in a mutually exclusive manner. See A.R.S. § 13-105(13, 18 and 24). We find it significant that the legislature does not consider any offense "petty" which could

result in any jail time let alone six months.

We turn now to a consideration of Arizona case law.

As we have noted, this court in Rothweiler established a three-part standard by which to determine whether an offense is petty or serious and, thus, whether a defendant is entitled to a jury trial. The Rothweiler court determined that a defendant in a DUI case was entitled to a jury trial because of the seriousness of the possible penalty together with the potentially grave consequences flowing from conviction.[2] Rothweiler, 100 Ariz. at 44-45, 410 P.2d at 484-85.

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[2]The maximum penalty Rothweiler could have received was a $300 fine and six months in jail; the court also had the authority to suspend his driving privileges for 90 days. 100 Ariz. at 39, 410 P.2d at 481.

Although the Rothweiler opinion referred to the "grave consequences" as implicating the moral quality of the crime, this suggests too narrow an inquiry. The Rothweiler court was undoubtedly concerned with the stigma associated with certain crimes, but it was primarily concerned with the nature of the consequences resulting from a conviction, such as the impact that losing one's driver's license could have on the defendant's ability to earn a living. Id.

Certainly, being charged with a crime of moral turpitude warrants a jury trial.[3] Damage to reputation, humiliation, and loss of dignity beyond that associated with all crimes brings moral turpitude crimes, by

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[3]The term "moral turpitude" generally refers to acts that adversely reflect on one's honesty, integrity, or personal values. See Ariz. R. S. Ct. 42, Rules of Professional Conduct, E.R. 8.4 (comment).

their very nature, into the realm of serious cases. However, being tried for a crime that does not fall within the definition of moral turpitude may also be serious enough to warrant a jury trial, chiefly because of the grave consequences resulting from conviction. Thus, we regard it as a mistake to read Rothweiler to hold that the moral quality prong only applies to moral turpitude crimes.

In State v. Pima County Superior Court, 121 Ariz. 174, 589 P.2d 48 (App. 1978), Division Two of the court of appeals, concerned about the accused's ability to earn a living, ruled that a misdemeanor charge of shoplifting required a jury trial. The court illustrated the impact of a conviction by listing a number of professions or occupations in which one's ability to obtain a license could be

restricted as a result of a shoplifting conviction. Id. at 175 n.3, 589 P.2d at 49 n.3 (e.g., attorneys, A.R.S. §32-273 (repealed); nurses, A.R.S. § 32-1663(A)(2); security guards, A.R.S. § 32-2615(3)).

We conclude that a conviction for possession of marijuana results in consequences sufficiently grave to warrant a jury trial. Not only could one convicted of possession of this illegal drug expect decreased employment opportunities, one could also reasonably expect the imposition of conditions to be placed on employment or potential employment, such as drug counselling, treatment, or testing. Moreover, certain occupational and professional licenses could conceivably be unavailable to these defendants should they be convicted (e.g., pharmacists, A.R.S. § 32-1927(A)(4) and (5), attorneys, Ariz. R.

S. Ct. 59(b)(1)(B)).

These types of consequences bring the crimes out of the category of petty cases and into the category of serious cases, despite the possible penalty being "only" a $1,000 fine and six months in jail. Thus, defendants are entitled to a jury trial.[4]

Having resolved the cases before us, it is unnecessary to go further and decide

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[4]While the federal and state constitutions speak in terms of the accused's right to a jury trial, we note that in Arizona by constitutional provision and by rule, the state's right to a jury trial is co-extensive with the accused's right, because the accused cannot waive his right to a jury without the consent of the prosecutor and the court. Ariz. Const. art. 6, § 17; Ariz. R. Crim. P. 18.1(b). See also A.R.S. § 13-3983. Although the majority in Moreno only addressed the jury trial issue in response to the dissent, we believe it is necessary, for the sake of clarity, to state specifically that we disapprove of the Moreno court's conclusion that the charge of simple possession of marijuana does not entitle defendant to a jury trial.

whether the Arizona Constitution requires a jury trial in all criminal cases, including those tried in non-record courts. We recognize that territorial statutes dating as far back as 1871 and remaining in force at the time the constitution was adopted, specifically provided for a jury upon demand in all criminal cases, including those in non-record courts. Penal Code, Title XXII, § 1318 (1913); Penal Code, Title XXI, § 1191 (1901; Penal Code, Title XXII, ch. 1, § 2217 (1887), Laws, ch. 11, § 583 (1871). We also note that the language of article 2, § 23 of the Arizona Constitution at the time of adoption clearly contemplated jury trials in non-record courts:

> The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number of less than twelve in courts not of record . . . (Amended to its current form, Nov. 7, 1972.)

Thus, one could argue that the state constitution at the time of adoption intended to provide for jury trials in all criminal cases. However, because we conclude that the instant case falls within the Rothweiler test, now slightly reformulated by us, we leave the alternative constitutional arguments for a case in which they must be addressed.

CONCLUSION

We hold that under Rothweiler a misdemeanor charge of possession of marijuana is sufficiently serious to warrant a jury trial, primarily because of the potentially grave consequences, together with the potential direct punishment, resulting from a conviction. The court of appeals opinion is vacated.

The superior court judgments are affirmed.

The cases are remanded for jury trials.

JAMES MOELLER, Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

STANLEY G. FELDMAN, Vice Chief Justice

JAMES DUKE CAMERON, Justice

C O R C O R A N, Justice, dissenting.

I respectfully dissent. Because I believe that defendants are not entitled to jury trials under either the federal constitution or the Arizona constitution, I would affirm the court of appeals' decision.

1. Federal law

In Blanton v. City of North Las Vegas, _____ U.S. _____, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), the Supreme Court held that persons charged under Nevada law with driving under the influence of alcohol are not entitled to jury trials. Under Nevada law, first-time DUI offenders face up to 6 months in jail and must pay a fine of up to $1,000--the same penalties imposable on persons convicted of misdemeanor possession of marijuana in Arizona. See A.R.S. §§ 13-707(A)(1), -802(A).

In reaching its decision, the Court observed that the most relevant criterion for determining the seriousness of an offense is the severity of the maximum penalty fixed by the statute. 109 S.Ct. at 1292. The Court held that an offense carrying a maximum jail term of 6 months or less will be presumed "petty," and stated:

> A defendant is entitled to jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.

109 S.Ct. at 1293 (emphasis added). Considering the maximum jail sentence of 6 months, together with the additional penalties imposed by the Nevada DUI statute, including a maximum fine of $1,000

and a 90-day driver's license suspension,[1] the Court concluded that DUI in Nevada is not a "serious" offense, and that, therefore, first-time DUI offenders are not entitled to jury trials under the Sixth Amendment to the United States Constitution.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." This safeguard is substantially the same as that provided by the Arizona Constitution. Article 2, § 23 provides that "[t]he right of trial by jury shall remain inviolate," while § 24 states: "In criminal prosecutions, the accused shall have the right . . . to have a . . . trial

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[1]The penalties imposed on first-time DUI offenders under Arizona law are nearly identical to those imposed under Nevada law. See A.R.S. § 28-692.01.

by an impartial jury . . . ."

Because the right to jury trial provided by the federal and Arizona constitutions are nearly identical, I would follow the interpretation placed on the federal provision by the United States Supreme Court in interpreting the Arizona provision. Accordingly, I would hold that the penalties faced by defendants in our case--6 month's imprisonment and a $1,000 fine--do not entitle them to jury trials.

2. Arizona law

Even assuming that we must apply a different standard in interpreting a defendant's right to a jury trial under the Arizona constitution and laws, I would hold that a misdemeanor possession of marijuana charge does not warrant a jury trial. As the majority correctly notes, the Rothweiler court established 3 factors to

use in determining a defendant's right to a jury trial: (1) the severity of the possible penalty, (2) the "moral quality of the act," and (3) the relation of the offense to common law crimes. Rothweiler, 100 Ariz. at 42, 410 P.2d at 483. The Rothweiler court focused primarily on the first factor in holding that a defendant charged with DUI was entitled to a jury trial. Noting that, if convicted, the defendant could be subject to "imprisonment, a fine and suspension of his right to drive for a period of time, or any combination of the three," the court held:

> The severity of the penalty that may be imposed demands that [defendant] be afforded protection of fundamental guarantees of life and liberty as guaranteed by the Arizona Constitution.

100 Ariz. at 44, 410 P.2d at 484.

We previously have held that a maximum penalty of 6 months' imprisonment and a $1,000 fine is not serious enough to warrant a jury trial. State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1078 (1980). Thus, Rothweiler's first factor would not entitle defendants in our case to jury trials.

Regarding the second factor--the moral quality of DUI--the Rothweiler court remarked:

> [I]ts moral quality has become offensive to the public as demonstrated by the severity of the punishment. Such conduct is repugnant to the community as well as the law because of the potential harm and evil that may result from such practice.

100 Ariz. at 44, 410 P.2d at 485 (emphasis added). Thus, the court's determination of the moral quality of the offense was guided by the severity of the penalty. A convicted defendant's potential loss of

driving privileges was merely a consideration in the court's determination of the severity of the penalty; it was not an independent factor militating in favor of a jury trial.

I agree with the court's statement in City of Phoenix v. Jones, 25 Ariz.App. 98, 100, 541 P.2d 424, 426 (1975):

> We have some difficulty in the area of assessing the "moral quality" of the act, feeling that moral judgments are best left in the hands of the legislature to mark the degree of decadency of the act by the penalty it imposes for its transgression.

Although the court of appeals vacated its opinion on a motion for reconsideration, the court adhered to its earlier pronouncement regarding the determination of an offense's "moral quality" in answering the defendant's claim that the crime of carrying a concealed weapon is one involving "moral turpitude":

> In our prior opinion, we specifically rejected the proposition that the judiciary is in a position to categorize the "seriousness" of a crime, this being a function of the legislature by setting the punishment to be exacted. We see no reason to deviate from this prior expression.

City of Phoenix v. Jones, 25 Ariz.App. 265, 266, 542 P.2d 1145, 1146 (1975). As evidenced by the maximum penalties imposable--6 months' imprisonment and a $1,000 fine--the "moral quality" of misdemeanor possession of marijuana does not entitle defendants in this case to jury trials.

This court has examined the "moral quality" of an offense by considering whether the defendant "is a depraved and inherently base person," or whether the offense "involve[s] serious moral turpitude." O'Neill v. Mangum, 103 Ariz. 484, 485, 445 P.2d 843, 844 (1968) (holding

that defendants charged with "drunk and disorderly" conduct were not entitled to a jury trial). Our court of appeals rejected a defendant's claim that he was entitled to a jury trial on his reckless driving charge, finding the offense was not "'an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.'" State ex rel. Dean v. City Court, 141 Ariz. 361, 363, 687 P.2d 369, 371 (App. 1984), quoting District of Columbia v. Colts, 282 U.S. 63, 73, 51 S.Ct. 52, 53, 75 L.Ed. 177, 213-14 (1930).

I would hold that the moral quality of a possession of marijuana charge is no worse than that of other offenses Arizona courts have held to be insufficient to satisfy Rothweiler's second factor. See Spitz v. Municipal Court, 127 Ariz. 405,

621 P.2d 911 (1980) (sale of alcoholic beverages to minors); State ex rel. Baumert v. Superior Court, (disorderly conduct); Bruce v. State, 126 Ariz. 271, 614 P.2d 813 (1980) (simple assault); Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975) (simple assault and battery); O'Neill v. Mangum (drunk and disorderly conduct); State ex rel. Dean v. City Court (reckless driving); City of Phoenix v. Jones, 25 Ariz.App. 265, 542 P.2d 1145 (1975) (carrying a concealed weapon).

The majority admits that possession of marijuana "does not fall within the definition of moral turpitude," but holds that Rothweiler's second factor is satisfied because of the "grave consequences resulting from conviction." I again point out that the Rothweiler court was concerned with the "grave consequences"

resulting from a DUI conviction--suspension of driving privileges--only in considering the first factor of the test--the severity of the possible penalty. The statute applicable in Rothweiler specifically authorized a court to suspend a convicted defendant's driver's license.

Adverse consequences that are not provided by the statute, but which nevertheless flow from a conviction, are insufficient to require a jury trial. In Spitz, we held that a defendant charged with selling liquor to a minor is not entitled to a jury trial, and stated:

> The fact that there might be an additional sanction, such as suspension of the liquor license by the Superintendent of the Department of Liquor Licenses and Control, A.R.S. § 4-210, does not mandate a jury trial.

127 Ariz. at 408, 621 P.2d at 914.

The majority concludes that "certain occupational and professional licenses could conceivably be unavailable to these defendants should they be convicted." In Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), the Supreme Court noted:

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.

399 U.S. at 73 (emphasis added). The fact that a conviction for possession of marijuana may affect future employment possibilities and the ability to obtain some professional licenses does not warrant

the classification of this offense as anything other than a petty offense not involving moral turpitude.

Unquestionably, the problem of illegal drugs is of national concern. Governmental agencies in Arizona and across the nation are working to eliminate the problems attendant to drugs--addiction, accidents, medical costs, etc. However, these facts do not transform a possession of marijuana charge into an offense involving moral turpitude. I feel that the severity of the potential penalty and the moral quality of the offense, taken together, are insufficient to render possession of marijuana, charged as a class 1 misdemeanor, a serious offense warranting a jury trial under Arizona law.

3. Conclusion

In Blanton, the Court indicated that it would look primarily to the actions of the legislature in fixing the maximum penalty for a crime to determine whether the crime was sufficiently serious to warrant a jury trial, and stated: "The judiciary should not substitute its judgment as to seriousness for that of a legislature . . . ." 109 S.Ct. at 1292. This court has also indicated that its determination of a crime's seriousness is guided by the legislature, stating that "the maximum statutory penalty is the most relevant objective criteria in determining a defendant's Sixth Amendment right to a jury trial . . . ." Bruce, 126 Ariz. at 273, 614 P.2d at 815.

In light of these judicial pronouncements, it would be appropriate for the legislature, in setting sanctions

imposable for conviction of crimes, to indicate that particular offenses, such as misdemeanor possession of marijuana or first-offense DUI, should not be tried before a jury. Assuming the constitutionality of the statute were challenged, this court could then face squarely the constitutional issues concerning a defendant's right to a jury trial.

Robert J. Corcoran, Justice

A P P E N D I X (ii)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STATE OF ARIZONA, Petitioner/ Appellant, v. THE CITY COURT OF THE CITY OF TUCSON, the HONORABLE CARMEN DOLNY, a Magistrate thereof; THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, the HONORABLE JOHN HAWKINS, a judge thereof, Respondents, and TIMOTHY HARING, Real Party in Interest/Appellee.	(Filed by Clerk April 19, 1988 Court of Appeals, Division Two) 2 CA-CV 87-0351 2 CA-CV 87-0353 (Consolidated) Department B O P I N I O N
STATE OF ARIZONA, Petitioner/ Appellant, v. THE CITY COURT OF THE CITY OF TUCSON, the HONORABLE MARGARITA BERNAL, a Magistrate thereof; THE SUPERIOR	

COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, the HONORABLE THOMAS MEEHAN, a judge thereof,

Respondents,

and

MARVIN LITTLES,

Real Party in Interest/Appellee.

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. 245298 and 245299

Honorable Thomas Meehan, Judge and
Honorable John Hawkins, Judge

VACATED AND REMANDED

Frederick S. Dean, City Attorney
by L. Michael Anderson and M.J. Raciti, Tucson
Attorneys for Petitioner/Appellant

DUNSCOMB AND SHEPHERD, P.C.
by Denice R. Shepherd, Tucson
Attorneys for Real Parties in Interest/Appellees

R O L L, Judge

In these unrelated cases, the state appeals the decisions of two Tucson city magistrates granting jury trials for two defendants charged with misdemeanor possession of marijuana. For the reasons set forth below, we conclude that the possibility of six months' incarceration and/or a $1000 fine as punishment for the class 1 misdemeanor of unlawful possession of marijuana does not require a trial by jury.

FACTS

1. Marvin Littles (Cause No. 245298, 2 CA-CV 87-0353)

On August 29, 1987, Marvin Littles was arrested for drinking in public in Tucson, Arizona. A police officer found a baggie of marijuana and some rolling papers in Littles' pocket. Littles was cited for unlawful possession of marijuana pursuant

to A.R.S. § 13-3405 and for drinking in public, a violation of A.R.S. § 4-244, both misdemeanor charges. On September 8, 1987, over the State's objection, a city magistrate set the matter for a jury trial to commence December 3, 1987.

2. Timothy Haring (Cause No. 245299, 2 CA-CV 87-0351)

On August 19, 1987, Haring was arrested by Tucson police officers after the police learned that Haring was named in outstanding misdemeanor warrants for: (1) driving under the influence of intoxicating liquor (DUI); (2) drivng (sic) while having a blood alcohol content of more than .10%, and (3) failure to appear regarding the preceding charges. The arrest resulted in the discovery of marijuana, and Haring was charged with unlawful possession of marijuana, a class 1 misdemeanor. On

August 20, 1987, the city magistrate set the matter for jury trial.

The state filed petitions for special action in both matters and relief was denied. These consolidated appeals followed.

ISSUES ON APPEAL

The sole issue on appeal is whether Littles and Haring are entitled to jury trials for their respective misdemeanor charges of possession of marijuana.

DISCUSSION

Unlawful possession of marijuana may be either a class 6 felony or a class 1 misdemeanor. The parties to this appeal agree that the charges against Littles and

Haring are class 1 misdemeanors.[1] A class 1 misdemeanor is punishable by up to 6 months' incarceration and/or a $1000 fine. A.R.S. § 13-802(A).

In Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the Supreme Court held that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, requires that persons accused of serious crimes be afforded the right to trial by jury and reaffirmed the well-established rule that petty offenses may be tried without a jury. In determining whether an offense is a petty offense, both the maximum possible period of imprisonment and the maximum

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[1]While the prosecutor may choose to pursue class 6 felony charges against an individual arrested for possession of marijuana, in the consolidated cases before us, the city prosecutor was pursuing misdemeanor penalties only.

possible fine must be considered.

The Supreme Court has announced that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Baldwin v. New York, 399 U.S. 66, 69, 90 S.Ct. 1886, 1888, 26 L.Ed.2d 437, 440 (1970) (footnote omitted). However, the Supreme Court has declined to state precisely when a potential fine renders an offense "serious" such that the matter must be tried to a jury. Muniz v. Hoffman, 422 U.S. 454, 477, 95 S.Ct. 2178, 2191, 45 L.Ed.2d 319, 335 (1975).

Until 1984, federal law provided that the maximum punishment for a petty offense was a $500 fine and/or six months' imprisonment. 18 U.S.C. § 1(3). In United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977), the Ninth Circuit stated that "[i]t

is not unrealistic to treat any fine in excess of $500 as a serious matter to all individuals . . . ." Id. at 280. However, in a footnote, the court stated:

> The value of money changes, of course, as does the wealth of the economy. But Congress can be expected to adjust the monetary standard of [18 U.S.C.] section 1(3) so that it will continue to represent a fair judgment as to the appropriate line between petty and serious offenses.
>
> * * *
>
> Whether [18 U.S.C.] §1(3) reflects an appropriate referent in determining the constitutional standard in light of future changes in the value of money or in future amendments of the statute will, of course, remain a question for the courts to determine. (Citation omitted.)

552 F.2d at 280 n.3. Our supreme court has previously rejected the Ninth Circuit's pronouncement in Hamdan that offenses punishable by more than a $500 fine must be tried to a jury, concluding that Hamdan was based upon 18 U.S.C. §1(3). State ex rel.

Baumert v. Superior Court, 127 Ariz. 152, 155, 618 P.2d 1078, 1081 (1980).

In 1984, Congress raised the maximum fine for petty offenses from $500 to $5000. Criminal Fine Enforcement Act of 1984, Pub.L. No. 98-596, § 8, 98 Stat. 3134, 3138 (1984).

Haring and Littles argue that the recent Ninth Circuit decision of Rife v. Godbehere, 814 F.2d 563, amended 825 F.2d 185 (9th Cir. 1987) stands for the proposition that an offense punishable by a $1000 fine is a serious offense requiring a jury trial. Rife was denied a jury trial after being charged with three counts of unlawful use of a telephone to terrify, intimidate, threaten, annoy, or harrass in violation of A.R.S. § 13-2916, a class 1 misdemeanor. Rife filed a habeas corpus petition, claiming that his constitutional

right to a jury trial had been denied. The Ninth Circuit held: "Rife was charged with a Class I misdemeanor, punishable by up to a $1,000 fine. Ariz. Rev. Stat. Ann. §13-802(A). Therefore, the crime charged was serious, and he was entitled to a jury trial." Id., 814 F.2d at 565. The Ninth Circuit later concluded in its amended opinion that the 1984 amendment to 18 U.S.C. § 1(3) was irrelevant to its decision since Rife committed the offenses before the federal petty offense maximum fine was increased from $500 to $5000. Id., 825 F.2d at 185.

The matters before us, of course, arose after the 1984 amendment to 18 U.S.C. § 1(3). Congress has, as the Ninth Circuit predicted in Hamdan, raised the maximum fine for federal petty offenses. It would seem incongruous that in federal court, a

petty offense with no right to a trial by jury is now punishable by a fine of up to $5000 while in state court, an otherwise petty offense has become a serious offense triable by a jury, because the maximum fine is $1000. We do not believe that Rife retains vitality in view of the 1984 Amendment of 18 U.S.C. § 1(3).

Our supreme court has stated that three factors must be considered in determining whether a defendant has a constitutionally guaranteed right to a jury trial: (1) the severity of the possible penalty; (2) the relation of the offense to common law crimes; and (3) whether the act involves moral turpitude. Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479 (1966); State ex rel. Dean v. City Court of Tucson, 141 Ariz. 361, 362, 687 P.2d 369, 370 (App. 1984); Spronken v. City Court of City of

Tucson, 130 Ariz. 62, 63-64, 633 P.2d 1055, 1056-57 (App. 1981). The supreme court has rejected the notion that a penalty of six months' incarceration and a $1000 fine are so serious as to require a jury trial. State ex rel. Baumert v. Superior Court, supra. The parties cite us to no authority, nor do we find a common law counterpart to the offense of unlawful possession of marijuana. Regarding moral turpitude, we agree with the comment by Division One of this court in State v. Moreno, 134 Ariz. 199, 655 P.2d 23 (App. 1982):

> Without the benefit of in-depth research, the majority is not prepared to say that in today's society the [offense of possession of marijuana] involves such an appreciable degree of moral turpitude (branding the defendant "a depraved and inherently base person") beyond that present in convictions for disorderly conduct (engaging "in fighting, violent or seriously disruptive behavior"), . . . drunk and disorderly conduct,

> . . . or assault and battery, . . . in all of which the Arizona courts have held that the defendant was not entitled to a jury trial. (Citations omitted.)

134 Ariz. at 202, 655 P.2d at 26.

In State ex rel. Dean v. City Court of Tucson, supra, 141 Ariz. at 363, 687 P.2d at 371, this court held that no jury trial was necessary for a charge of reckless driving, stating:

> Finally, we do not believe that reckless driving is today considered to be "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense." . . . We find it impossible to distinguish this offense from those which have been held in the following cases to involve no moral turpitude . . . . (sale of alcoholic beverages to minors); . . . (disorderly conduct); . . . (simple assault); . . . (simple assault and battery); . . . (possession of marijuana); . . . (carrying a concealed weapon); . . . (Citations omitted.)

We hold that none of the three factors we must consider requires that Haring and

Littles be afforded jury trials as to the present misdemeanor charges of unlawful possession of marijuana.

Haring argues that the combination of charges pending against him mandates a jury trial. The record is unclear as to which charges Haring will face at trial in addition to the charge of unlawful possession of marijuana. Haring is entitled to a jury trial for the two original DUI charges, Rothweiler v. Superior Court of Pima County, supra, although he is not entitled to a jury trial on the misdemeanor marijuana charge. If these charges are joined for trial, he will, of course, receive a jury trial on the marijuana charge by virtue of that charge being joined with charges for which he is entitled to a jury trial. If severance of the marijuana charge is

granted pursuant to Rule 13.4 Ariz. R. Crim. P., 17 A.R.S., Haring will not be entitled to a jury trial for the single charge of unlawful possession of marijuana.

Littles' case significantly differs from that of Haring's in that Littles' unlawful possession of marijuana charge is not presently joined with other offenses requiring a jury trial. Accordingly, unlike Haring's case, no question of a possible necessity for severance is presented. The briefs of the parties indicate that Mr. Littles was originally charged with drinking in public and unlawful possession of marijuana. In Bruce v. State, 126 Ariz. 271, 614 P.2d 813 (1980), the supreme court held that "where a defendant is charged with several petty offenses, factually related or arising out of a single event, there is no

constitutional requirement of a jury trial but the actual punishment may not exceed that which would be permissible without a jury trial in case of a single offense." 126 Ariz. at 272, 614 P.2d at 814. Bruce is determinative of the outcome and Littles is not entitled to a jury trial.

We vacate the orders granting jury trials on the respective charges of unlawful possession of marijuana and remand these matters for disposition in accordance with this opinion.

JOHN M. ROLL, Judge

CONCURRING:

JOSEPH M. LIVERMORE, Presiding Judge

LLOYD FERNANDEZ, Judge

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IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Petitioner, vs. THE CITY COURT OF THE CITY OF TUCSON, the HONORABLE MARGARITA BERNAL, a Magistrate thereof, Respondent, and MARVIN LITTLES, Real Party in Interest.	)	NO. 245298 (Tucson City Court Cause No. 1668293) JUDGMENT (Hon. Thomas Meehan) (Div. 16)

This matter having come regularly for hearing; the Court having reviewed the memorandum of counsel, the Court finds that

the City Magistrate did not abuse her discretion in granting the Defendant a trial by jury on the pending charges.

IT IS HEREBY ORDERED, adjudged and decreed as follows:

1. Petititoner's Request for Special Action is DENIED.

2. Matter is remanded to City Court for all further proceedings.

3. ORDERED that all further matters in this case are stayed pending a decision by Division 2 of the Court of Appeals.

DATED this 2nd day of November, 1987.

By: _____
Thomas Meehan
Judge of Superior Court
Division 16

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: Thomas Meehan

Case No.: C-245298

Date: October 26, 1987

STATE OF ARIZONA

vs.

THE CITY COURT OF THE
CITY OF TUCSON, et al

AND MARVIN LITTLES

M I N U T E E N T R Y

AMENDED MINUTE ENTRY:

In Minute Entry dated October 13, 1987, paragraph three, the word "use" should be deleted and the word "abuse" should be inserted.

cc: Hon. Thomas Meehan
City Prosecutor Bromley
Dunscomb & Shepherd

Court of Appeals Division 2,
Tucson, Arizona

By:_____
Carlene Price
Deputy Clerk

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: Thomas Meehan

Case No.: C-245298

Date: October 13, 1987

STATE OF ARIZONA

vs.

THE CITY COURT OF THE
CITY OF TUCSON, et al

AND MARVIN LITTLES

M I N U T E E N T R Y

CIVIL OSC:

Counsel argues to the Court.

THE COURT FINDS it has jurisdiction to hear the State's Special Action; the Court having reviewed the memorandum of counsel,

THE COURT FINDS the City Magistrate did not use her discretion in granting defendant a trial by jury on the pending charges.

IT IS ORDERED Petitioner's request for special action is denied and remanded to

City Court for all further proceedings.

IT IS FURTHER ORDERED that all further matters in the case be stayed pending a decision by Division 2 of the Court of Appeals.

cc: Hon. Thomas Meehan

City Prosecutor Bromley

Dunscomb & Shepherd

Court of Appeals Division 2,
Tucson, Arizona

By: _____
Carlene Price
Deputy Clerk

TUCSON CITY COURT

State of Arizona, Plaintiff

vs.

Marvin Littles

Docket #8775868
Citation #1669293-4

MINUTE ENTRY

The matter is stayed pending a decision by the Court of Appeals.

DATED: October 26, 1987

Signed by: Judge L. Gallagher

TUCSON CITY COURT

State of Arizona, Plaintiff

vs.

Marvin Littles

Docket #8775868
Citation #1668293-4

ACKNOWLEDGMENT OF TRIAL DATE

I hereby acknowledge the trial (jury) date of December 3, 1987 at 8:15 a.m.

I understand that I have a criminal charge and if I fail to appear at the date and time shown, a warrant may be issued for my arrest, and the trial could be held without me.

DATED: (Not dated)

Marvin Littles
2721 E. Sixth St.
Tucson, Ariz. 85716
326-5195

FREDERICK S. DEAN
City Attorney
M.J. Raciti
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Tucson, AZ 85726
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IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Petitioner, vs. THE CITY COURT OF THE CITY OF TUCSON, the HONORABLE CARMEN DOLNY, a Magistrate thereof, Respondent, and TIMOTHY HARING, Real Party in Interest.	)	NO. 245299 (Tucson City Court Cause No. 1614834) JUDGMENT (Judge Hawkins) (Division 17)

This matter having come regularly before this Court for hearing in the form of a Special Action; the Court having heard

arguments of counsel; having considered relevant case law; having read briefs of counsel for Petitioner and Real Party in Interest and having taken the matter under advisement, finds as follows:

1. The Honorable Judge Carmen Dolny, Magistrate of the City Court, granted a jury trial to Real Party in Interest, Timothy Haring, on a charge of violating A.R.S. § 13-3405.

2. From that ruling, the Petitioner brings this Special Action contending Judge Dolny's decision was arbitrary and capricious or that she abused her discretion in granting the jury trial.

3. The Court has considered the relevant case law and arguments of counsel and while concluding that a jury trial is not mandated, finds that Judge Dolny's granting a jury trial was not arbitrary or

capricious nor was it an abuse of her discretion.

WHEREBY IT IS ORDERED that the requested relief is denied and this matter is remanded to City Court for all further proceedings.

DATED this 2nd day of November, 1987.

By: _____
John G. Hawkins
Judge of Superior Court
Division 17

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: John G. Hawkins

Case No.: 245299

Date: October 14, 1987

STATE OF ARIZONA

vs.

CITY COURT, HON. CARMEN DOLNY and

TIMOTHY HARING

M I N U T E E N T R Y

U/A RULING RE SPECIAL ACTION:

Hon. Carmen Dolny, Magistrate of the City Court, granted a jury trial to the Real Party in Interest, Timothy Haring, on a charge of violating A.R.S. § 13-3405. From that ruling the Petitioner brings this special action contending that Judge Dolney's decision was arbitrary and capricious or that she abused her discretion in granting the jury trial.

This Court has considered the relevant

case law and arguments of counsel and while concluding that a jury trial is not mandated finds that Judge Dolney's granting a jury trial was not arbitrary and capricious nor was it an abuse of her discretion.

IT IS ORDERED that the requested relief is denied and this matter remanded to City Court for all further proceedings.

cc: City Prosecutor - Raciti

Denice Shepherd, Esq. -
Dunscomb & Shepherd

Hon. John G. Hawkins

U/A Clerk

City Court (No. 1614834)

By: _____
Rhonda Rutledge
Deputy Clerk

A P P E N D I X (iii)

SUPREME COURT

State of Arizona
201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone: (602) 542-4536

NOEL K. DESSAINT
Clerk of Court

KATHLEEN E. KEMPLEY
Chief Deputy Clerk

September 26, 1989

RE: STATE OF ARIZONA vs. TUCSON CITY COURT HONORABLE CARMEN DOLNY et al
Supreme Court No. CV-88-0272-PR
Court of Appeals No. 2 CA-CV 87-0351
& 2 CA-CV 87-0353 (Consl.)
Pima County No. 245299 & 245298

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 19, 1989, in regard to the above-referenced cause:

ORDERED: Application for Permission to File Brief as Amicus Curiae = DENIED.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran voted to grant.

Mandate enclosed.

NOEL K. DESSAINT, Clerk

TO:

Frederick S. Dean, Tucson City Attorney, P.O. Box 27210, Tucson, Tucson, AZ 85726-7210 ATTN: William F. Mills, Esq. and Christopher L. Straub, Esq.

Denice R. Shepherd, Esq., Dunscomb & Shepherd, 177 N. Church, Suite 310, Tucson, AZ 85701

Kevin R. Hays, Esq., Mesa City Prosecutors Office, 245 W. 2nd St., P.O. Box 1466, Mesa AZ 85211-1466

SUPREME COURT OF ARIZONA

STATE OF ARIZONA Petitioner/ Appellant, vs. CITY COURT OF THE CITY OF TUCSON, HONORABLE CARMEN DOLNY, a Magistrate thereof; SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, HONORABLE JOHN HAWKINS, a judge thereof, Respondents, and TIMOTHY HARING, Real Party in Interest/Appellee.	Supreme Court No. CV-88-0272-PR **M A N D A T E**
STATE OF ARIZONA, Petitioner/ Appellant, vs. CITY COURT OF THE CITY OF TUCSON, HONORABLE MARGARITA BERNAL, a Magistrate thereof; SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA,	

HONORABLE THOMAS MEEHAN, a judge thereof,

Respondents,

and

MARVIN LITTLES,

Real Party in Interest/Appellee.

STATE v. TUCSON CITY COURT et al
Supreme Court No. CV-88-0272-PR
Court of Appeals Nos. 2 CA-CV 87-0351 & 2 CA-CV 87-0353
Pima County Nos. 245298 & 245299

MANDATE

TO: The Honorable Superior Court for Pima County, Arizona, in relation to Cause Nos. 245298 and 245299.

GREETINGS:

The above cause was presented in your Court and was brought before the Court of Appeals, Division Two, Nos. 2 CA-CIV 87-0351 and 2 CA-CV 87-0353 (consolidated), in the manner prescribed by law. That court rendered its Opinion and caused the same to

be filed on the 19th day of April, 1988.

A Petition for Review was granted by this Court on the 27th day of September, 1988. This Court rendered its Opinion and caused the same to be filed on the 15th day of June, 1989.

A Motion for Reconsideration was timely filed and was denied by Order of this Court on the 19th day of September, 1989.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the Opinion of this Court, a copy of the Opinion being attached hereto.

WITNESS, THE HONORABLE FRANK X. GORDON, JR., Chief Justice of the Supreme Court of the State of Arizona, this 27th day of September, 1989.

_____

NOEL K. DESSAINT
Clerk of Court

TO:

Frederick S. Dean, Tucson City Attorney
Attn: Christopher L. Straub, Esq. and
William F. Mills, Esq.

Denice R. Shepherd, Esq., Dunscomb &
Shepherd

Kevin Hays, Chief Assistant Mesa City
Prosecutor

Hon. Carmen Dolny, Tucson City Court

Hon. Margarita Bernal, Tucson City Court

Hon. John G. Hawkins, Judge, Pima County
Superior Court

Hon. Thomas Meehan, Presiding Judge,
Pima County Superior Court

Ronald L. Zimmerman, Tucson City
Court Administrator

Sue Evans, Pima County Court
Administrator (with copy of Opinion)

Joyce Goldsmith, Clerk, Court of
Appeals, Division Two

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